No. 6538

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TATSUMI MASUDA,
Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,
Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

This appeal is from an order of the District Court for the Southern Division of the Northern District of California denying appellant's petition for writ of habeas corpus (Tr. 33).

FACTS OF THE CASE.

The appellant was admitted into the United States on July 13, 1928, "as a temporary visitor for a period

of six months" (Respondent's Exhibit A, p. 5; Tr. p. 2).

At the expiration of the period of six months for which he was admitted he did not depart from the United States and made no application for an extension of his temporary admission. On March 1, 1929, nearly eight months after his temporary admission, and about two months after his temporary permission had expired he took up employment as a bookkeeper with Z. Inouye, a merchant at Sacramento. On May 1, 1929, nearly ten months after his temporary admission and about four months after his temporary permission had expired, he became manager of the firm of Z. Inouye and Company (Tr. pp. 3 and 4).

On July 18, 1930, deportation proceedings were instituted against him (Respondent's Exhibit A, p. 3), and after hearing he was ordered deported by the Secretary of Labor under the Immigration Act approved May 26, 1924, on the following ground:

> "That he has remained in the United States for a longer time then permitted under the said act or regulations made thereunder." (Respondent's Exhibit A, p. 44)

THE ISSUE.

The sole question is whether an alien who is unlawfully in the United States and subject to deportation may, while so unlawfully in the United States, obtain

a right to remain as a trader by taking up a mercantile occupation.

ARGUMENT.

We shall show: first, that at the expiration of six months after his entry on July 13, 1928, appellant was unlawfully in the United States and subject to immediate deportation; and, second, that appellant could gain no right to remain in the United States by assuming a trader's occupation while unlawfully in the country.

I.

AT THE EXPIRATION OF SIX MONTHS AFTER ENTRY APPELLANT WAS UNLAWFULLY IN THE UNITED STATES AND SUBJECT TO IMMEDIATE DEPORTATION.

Let us first consider the pertinent statutory provisions.

Section 13 of the Immigration Act, approved May 26, 1924, (8 U. S. C. A., Sec. 213) provides:

> "No alien ineligible to citizenship shall be admitted to the United States unless such alien * * * is not an immigrant as defined in Section 3."

Appellant, being a person of Japanese race, (Respondent's Exhibit A, p. 9) is an alien ineligible to citizenship.

> *Takao Ozawa v. United States,* 260 U. S. 178; 43 S. Ct. 65; 67 L. Ed. 199.

We turn then to Section 3 of the Act (8 U. S. C. A., Section 203) defining the classes of aliens who are not immigrants. That section provides:

> "When used in this act the term 'immigrant' means any alien departing from any place outside of the United States destined for the United States, except (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure."

That is the provision under which appellant was admitted into the United States on July 13, 1928.

The conditions and limitations of that admission are expressly stated in Section 15 of the Act (8 U. S. C. A., Sec. 215) which provides as follows:

> "The admission to the United States of an alien excepted from the class of immigrants by clause (2) * * * of Section 3 * * * shall be for *such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed* * * * to insure that, at the *expiration of such time* or upon failure to maintain *the status under which admitted* he will depart from the United States."

The regulation authorized by that section and by Section 24 of the Act (8 U. S. C. A., Sec. 222) provides as follows:

> "In cases where an alien claims to be visiting the United States temporarily as a tourist or temporarily for business or pleasure, if the exam-

> ining officer is satisfied beyond a doubt of the applicant's status, he may temporarily admit such alien, if otherwise admissible, for a reasonable *fixed period,* under no circumstances to exceed one year, on condition that such alien shall maintain such status of a non-immigrant during his temporary stay in the United States and voluntarily depart therefrom at the expiration of the time fixed and allowed." (Immigration Rule 3—Subdivision H, par. 1.)

Appellant was admitted for the fixed period of six months (Respondent's Exhibit A, p. 5; Tr. p. 2).

What then was appellant's situation when this six months' period expired?

Under the express provisions of Section 14 of the Act he was subject to immediate deportation. That section provides (8 U. S. C. A., Sec. 214):

> "Any alien who at any time after entering the United States is found * * * to have remained therein for a longer time than permitted under this act or regulations made thereunder, shall be taken into custody and deported. * * * "

At this point we might invite attention to the fact that Immigration Rule 25, subdivision C, permits the filing of an application to extend the time of temporary admission. That regulation provides further that,

> "Applications for extensions shall not be granted except in cases where the reasons given are persuasive and in no instance where an applicant who

> has been admitted temporarily for business or pleasure has taken up employment or employment different from that for which admitted, or it is apparent that it is the applicant's desire to remain permanently in the United States."

Appellant did not avail himself of this privilege of making application for an extension at the time of the expiration of his temporary stay and, therefore, it is obvious that on the expiration of the six months period for which he was admitted he became immediately subject to deportation under the express provisions of Section 14, supra.

Appellant makes frequent allusion to the Treaty of Commerce and Navigation entered into between the United States and the Empire of Japan on February 21, 1911. It is only necessary to point out that the rights of appellant are measured by the Immigration Act of 1924 and that the only treaty rights preserved by that Act are those mentioned in Section 3 (6) thereof, which excepts from the classification of "immigrant",

> "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." (8 U. S. C. A., Sec. 203 (6).)

The effect of the Immigration Act of 1924 on existing treaty rights is clearly settled by the decision of this court in

Jeu Jo Wan v. Nagle, 9 F. (2d) 309.

In that case the appellant, a Chinese teacher, presented a teacher's certificate which was admittedly sufficient to entitle him to an entry into the United States under the Chinese Treaty and the Chinese Exclusion Act. He was denied admission on the ground that he had not brought himself within the exceptions to the excluding provisions of the Immigration Act of 1924. The court considered the effects of Sections 25 and 28 of the Act (8 U. S. C. A., Secs. 223 and 224 (g)) upon existing treaty rights and said:

> "It will thus be seen that the Immigration Act of 1924 abrogates all laws, conventions and treaties relating to the immigration, exclusion, or expulsion of aliens, inconsistent with its provisions, and that *the only* treaty rights preserved are those relating to aliens entitled *to enter* the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

See also,

> *Wong Gar Wah v. Carr,* (C. C. A. 9) 18 F. (2d) 250, (certiorari denied, 275 U. S. 529).

There is no contention here that *at the time of his entry* appellant was an alien entitled to enter solely to carry on trade. Nor is it contended that he was a trader at the expiration of the six months period for which he was allowed to enter as a visitor. At that time his temporary rights as a visitor had expired and he was subject to deportation under the express pro-

visions of Section 14 of the Immigration Act of 1924.

Wong Gar Wah v. Carr, supra;
United States ex rel Orisi v. Marshall, (C. C. A. 3) 46 F. (2d) 853.

His sole contention is that *four months after the period of his temporary admission expired* he entered into a trading occupation and that he thereby gained a right to remain under Section 3 (6) of the Act, as one entitled to enter solely to carry on trade under and in pursuance of the provisions of a treaty of commerce and navigation.

As we have shown above, appellant was subject to deportation immediately after the expiration of his six months period. It is admitted that he was not then a trader. It is not disputed that he could have been deported at any time thereafter up to the time he entered into the mercantile occupation. We are therefore brought back to the sole question whether an alien who is unlawfully in the United States and subject to deportation can remain therein by taking up an exempt occupation.

II.

APPELLANT GAINED NO RIGHT TO REMAIN IN THE UNITED STATES BY ASSUMING THE OCCUPATION OF A TRADER WHILE UNLAWFULLY HERE.

The authorities are unanimously to the effect that where an alien is unlawfully in the United States he

can not gain any right of continued residence therein by taking up an exempt occupation.

Kaichiro Sugimoto v. Nagle, (C. C. A. 9), 38 F. (2d) 207; certiorari denied, 281 U. S. 745;
Wong Gar Wah v. Carr, supra;
Wong Mon Lun v. Nagle, (C. C. A. 9) 39 F. (2d) 844;
Wong Fat Shuen v. Nagle, (C. C. A. 9) 7 F. (2d) 611;
Ewing Yuen v. Johnson, 299 Fed. 604;
In re Low Yin, 13 F. (2d) 265.

Appellant concedes this principle but he attempts to make a distinction on the ground that his *entry* was not unlawful. But in

Ng Fung Ho v. White, 259 U. S. 276, at 281,

the Supreme Court said:

"One who has entered lawfully may remain unlawfully."

In

Tulsidas v. Insular Collector of Customs, 262 U. S. 258,

in interpreting certain provisions of the Immigration Act of 1917, the Supreme Court said:

"The law defines the classes of aliens who shall be excluded from admission to the United States, but provides that the exclusion shall not apply to persons having the status or occupations of 'mer-

chants'. This means, necessarily, *having the 'status' at the time admission is sought, not a status to come or to be established.''*

In

Kaichiro Sugimoto v. Nagle, supra,

the appellant was *admitted* into the United States, but his admission was limited as to place, i. e., he was admitted into Hawaii but not to the Continental United States. In the case at bar appellant's admission was limited as to time. Sugimoto violated the limitation of his admission by proceeding to the Continental United States, after which he took up an exempt occupation by engaging in business. Appellant here violated the limitation of his admission by remaining beyond the fixed period of six months, after which he took up an alleged exempt occupation. We submit that there is no distinction in principle. In the Sugimoto case this court said:

> "At the time of his original entry he was a laborer, and the fact that during his residence in California he changed his occupation from that of laborer to that of merchant does not change the situation so far as his admissibility is concerned. (Citing *Tulsidas v. Insular Collector of Customs,* supra; and *Wong Fat Shuen v. Nagle,* supra.)''

In

Ewing Yuen v. Johnson, supra,

the court said:

> "He applied for and *obtained temporary admission* under the immigration laws as an alien

> otherwise inadmissible. He entered into a solemn obligation with the authorities representing the United States Government to depart within six months. *At the expiration of that period his stay within the United States was unlawful.* * * * He is not helped by the fact that since coming to the United States he has acquired the status of a merchant. (Citing *Tulsidas v. Insular Collector of Customs,* supra.)"

In the case of

> *In re Low Yin,* supra,

the petitioner was a seaman and at the time of his entry was entitled to temporary admission as a non-immigrant under Section 3 (5) of the Immigration Act of 1924. In that case the court said:

> "While it is true that the alien was allowed to land, it is equally true that he was not then admissible, and could only have been admitted temporarily. This temporary admission was neither sought nor granted. If we assume that since his arrival he has acquired the status of a merchant, we do not help the alien, because it is well settled that the right to come into and remain in the United States depends upon the status *at the time of entry. Tulsidas v. Insular Collector,* 262 U. S. 258, 43 S. Ct. 586, 67 L. Ed. 969; *Ewing Yuen v. Johnson* (D. C.) 299 F. 604."

Obviously an alien who obtains entry for a temporary fixed period as a visitor, and although subject to deportation by express terms of the Act at the expira-

tion of that fixed period, clandestinely remains in the country after said period has expired, is thereafter unlawfully in the United States just as much as if his original entry had been clandestine and unlawful.

Ng Fung Ho v. White, supra.

In

Wong Mon Lun v. Nagle, supra,

this court held that,

> "one who enters the United States fraudulently and unlawfully acquires no right from the occupation in which he afterwards engages during a residence thus unlawfully initiated and maintained."

We do not contend that appellant *entered* unlawfully, but "one who has entered lawfully may *remain* unlawfully," and we do contend that when appellant remained in the United States beyond the fixed period of six months for which he had been admitted, he was then unlawfully here. It can not be denied that he could have been instantly deported under the express terms of Section 14 of the Act.

In

Ex parte Wu Kao, 270 Fed. 351,

the petitioner sought admission as a person entitled to enter under the Chinese treaty and exclusion laws, but his application for admission was denied. On appeal to the Department, however, he was granted permission to enter temporarily for a period of one year

on condition that a recognizance be given to secure his appearance at the expiration of one year. Thereafter the petitioner engaged in a mercantile business and sought to remain on that ground, since under the Chinese treaty and the Chinese Exclusion Act merchants are an exempt class. The court said:

> "Since the petitioner was not admitted, he is not entitled to residential rights, and he may not plead an exempt status which he acquired during the probationary period. What he did in endeavoring to establish a mercantile status was in fraud of the department and out of harmony with the stipulation and recognizance of the temporary admission. Being engaged in such enterprise without residential right, no residential status obtained, and no vested right could follow, as was held by this court in Ex parte Mac Fock, D. C. 207 Fed. 796. In this case the court said, at page 698: 'No lapse of time could ripen such a wrong into a right nor afford a basis upon which to predicate abuse of discretion.' "

Again in

> *Wong Gar Wah v. Carr* (C. C. A. 9), 18 F. (2d) 250,

the appellant had been admitted as a visitor, as was the appellant here. He sought to remain on the ground that he had become a merchant and trader. Circuit Judge Rudkin said:

> "From the foregoing statement it seems quite apparent that the appellant is in the country with-

> out right. As a merchant, the certificate is made the sole evidence of his right to enter or remain, and he has no such certificate. On the other hand, *such temporary rights as he acquired by the traveler certificate have long since expired by lapse of time and he is subject to deportation under the express provisions of section* 14 *of the Immigration Act of* 1924."

In the case at bar appellant, of course, would not be required to produce the certificate required by the Chinese Exclusion Act. But production of a visa of an American consular officer certifying his status as a non-immigrant trader is a prerequisite of admission under such status.

The Passport Act of May 22, 1918, as extended by the Act of March 2, 1921 (8 U. S. C. A., Sec. 227) empowers the President to impose restrictions upon the entry of aliens by proclamation. By Executive Order No. 4813 promulgated by President Coolidge on February 21, 1918, non-immigrants are required to present passports "duly visaed by consular officers of the United States". Regulations of the Department of State (No. 926, General Instruction Consular—Diplomatic Serial No. 2731, pages 16 and 17) provide as follows:

> "Consuls will exercise special care in handling cases arising under section 3 (6) of the act, which relates to aliens 'entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.' * * *

"While the department desires that consuls should extend every proper facility to aliens clearly coming within the purview of the statute and treaties, it considers it equally important that they should avoid granting visas to aliens wrongfully claiming rights thereunder.

"In order to obtain a visa under the statutory and treaty provisions referred to the applicant must show that he is going to the United States in the course of a business which involves, substantially, trade or commerce between the United States and the territory stipulated in the treaty

* * * * * * *

"Consuls are authorized, in their discretion, to require applicants for visas as non-immigrants, within the category mentioned, to present documentary evidence that they, in fact, belong thereto."

Rules prescribed by the Department pursuant to law have the force and effect of law.

Fok Yung Yo v. United States, 185 U. S. 296;
Chun Shee v. White (C. C. A. 9th), 9 Fed. (2d) 342.

A visa under § 3 (6) of the Immigration Act of 1924, therefore, can only be issued after determination by a consular officer that the applicant is of the class entitled thereto.

Lack of such non-immigrant visa of itself precludes entry as a non-immigrant.

Goldsmith v. U. S. (C. C. A. 2), 42 F. (2d) 133, at 136, 137;

U. S. ex rel. Komlos v. Trudell, 35 F. (2d) 281;
U. S. ex rel. Graber v. Karnuth, 30 F. (2d) 242 (C. C. A. 2);
U. S. ex rel. London v. Phelps (C. C. A. 2), 22 F. (2d) 288.

The issuance of such a visa is not a ministerial act, but involves discretion on the part of the consular officer.

U. S. ex rel. London v. Phelps (C. C. A. 2), 22 F. (2d) 288;
U. S. ex rel. Johansen v. Phelps, 14 F. (2d) 679;
U. S. ex rel. Graber v. Karnuth, 29 F. (2d) 314.

We submit that appellant could gain no rights of continued residence in the United States by taking up the occupation of a trader several months after the period of his temporary admission expired, for two reasons: First, because at the time of taking up said occupation his presence in the United States was in violation of law and he was then, and had been for some time previous thereto, subject to immediate deportation upon apprehension, and, secondly, because the statutes and the proclamation issued thereunder require a consular visa as a trader as a prerequisite to admission as such

APPELLANT'S ARGUMENT.

Appellant contends that the law and regulations do not expressly state that after the expiration of the period fixed an alien visitor "shall be deemed to be unlawfully in the United States". The act of 1924 specifically says that the admission is for such time as may be by regulations prescribed to insure that *at the expiration of such time* he will depart from the United States (8 U. S. C. A., Sec. 215). The regulations prescribe "a reasonable *fixed* period, under no circumstances to exceed one year" (Immigration Rule 3, subdivision H). The act further provides that any alien found to have remained *longer than permitted under the act and regulations,* shall be deported (8 U. S. C. C. A., Sec. 214). Aliens who are lawfully in the United States are not deported. We fail to see how the act and regulations could have limited the lawful stay of a temporary visitor more specifically.

Under the sections of the act and the regulations above cited there can be no doubt that appellant at the expiration of six months from the date of his entry became immediately subject to deportation. Further stay was not permitted by the act and regulations, and hence in staying beyond that six months he violated sections 14 and 15 of the act and rendered himself instantly subject to deportation.

Petitioner cites a decision of this court rendered on May 26, 1930, in the case of

Metaxis v. Weedin, No. 5947,

which decision the court later reversed on rehearing (*Metaxis v. Weedin,* 44 F. (2d) 539).

The facts in the *Metaxis* case, and the law applicable thereto, are entirely different from those in the case at bar.

In the *Metaxis* case the appellant was admitted on February 11, 1924, for a period of six months under the Quota Act of 1921, as amended in 1922 (42 Stat. 5, 540). When the present Immigration Act of 1924 was enacted on May 26, 1924, his presence in the United States was still lawful. His six months had not expired. The new act of 1924 excepted from the class of immigrants:

> "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

This court in the first opinion held:

> "If his original entry had been wrongful he could not by changing his status thereafter, and *while wrongfully within the United States,* acquire a right to remain therein. (Sugimoto v. Nagle, 38 F. (2d) 207.) Here, however, his *entry was legal* and his change of status made *in good faith.* No law has been violated by his change."

The holding of the court in the first opinion in the *Metaxis* case was that a treaty merchant could remain,

> "where his original entry was lawful, *and his change of status was not unlawful.*"

Furthermore, in the *Metaxis* case it appeared that the appellant changed his status, *"during his temporary visit"*. Hence he was not wrongfully within the United States when he took up the mercantile occupation, and the change was made in good faith. The deportation provisions of the Immigration Act of 1924 did not apply to Metaxis because he entered prior to the enactment of that act. The court said further:

> "No law has been violated by his change, but he did agree to leave within six months and that period has expired. The Secretary of Labor, however, is not empowered to enforce such an agreement by deportation. This power to deport aliens is based upon section 19 of the Immigration Act of 1917. * * * The appellant does not come within the provisions of this section."

In the case at bar the Secretary of Labor, by the Act of 1924, *is* empowered to deport upon failure of an alien to depart within the time for which he was admitted. That power in this case does not rest upon Section 19 of the Immigration Act of 1917 under which deportation was sought in the *Metaxis* case. It is expressly conferred by Section 14 of the subsequent Immigration Act of 1924. Furthermore, appellant here was "wrongfully in the United States" when he took up his claimed exempt occupation.

What of his "good faith"?

> "Q. Did you not understand that it would be unlawful for you to engage in any employment

in view of the fact that you had been admitted to the United States as a visitor?

A. Yes, I knew it was unlawful."

(Respondent's Exhibit A, p. 8.)

We submit therefore that the present case is in no respect analogous to the *Metaxis* case either on the facts or on the statutes applicable. Metaxis was not unlawfully within the United States when he took up a mercantile occupation. Petitioner was unlawfully in the United States from and after January 13, 1929, and did not take up the alleged exempt status until about four months thereafter. To what extent he was in good faith is conclusively established by the record.

We are brought back, therefore, to the question whether an alien while unlawfully in the United States and subject to deportation can acquire a right to remain by taking up an exempt occupation. We submit that under all the authorities, including the Metaxis opinion relied upon by petitioner, that question must be answered in the negative.

THE DANG FOO CASE.

Appellant cites the case of

Dang Foo v. Day, 50 F. (2d) 116.

The rights of Dang Foo have been the subject of extensive litigation before this and other courts.

A brief outline of the history of this litigation may be helpful to a clearer understanding of the case. Originally Dang Foo appealed to this court from an order of the District Court for the Western District of Washington denying his petition for a writ of habeas corpus. This was at the time he first applied for admission to the United States. This court on appeal reversed the order of the District Court (*Dang Foo v. Weedin,* 8 F. (2d) 221). Pursuant to that judgment Dang Foo was admitted into the United States. Thereafter he embarked in business as a merchant in New York and later applied for an extension of his temporary permit, which was granted by the immigration authorities on condition that he give a bond guaranteeing his departure six months thereafter. The bond was furnished and on his failure to depart was ordered forfeited. He thereupon filed a bill in equity in the District Court for the Southern District of New York, wherein he prayed for an injunction restraining the forfeiture of the bond. The bill was dismissed in the District Court. That judgment was reversed on appeal, with Circuit Judge Swan dissenting.

Dang Foo v. Day, 50 F. (2d) 116.

It is upon the last mentioned opinion that appellant relies.

Let us now consider the decision of this court ordering his discharge on habeas corpus. At the time of his arrival at Seattle, Dang Foo presented a trav-

eler's certificate issued under Article 2 of the Treaty with China (22 Stat. 826, 827), and under Section 6 of the Chinese Exclusion Act of May 6, 1882, as amended (8 U. S. C. A., Sec. 265). Under the treaty and the Exclusion Act, therefore, he was admissible as a traveler and the traveler's certificate was made "prima facie evidence of the facts set forth therein * * * but said certificate may be contraverted and the facts therein stated disproved by the United States authorities" (8 U. S. C. A., Sec. 265). So far as the Immigration Act of 1924 was concerned, he was entitled to enter temporarily as a visitor under Section 3 (2) thereof (8 U. S. C. A., Sec. 203 (2)).

The immigration authorities denied Dang Foo admission on the ground that he was not a bona fide traveler. He then petitioned the District Court for the Western District of Washington for a writ of habeas corpus which was denied. On appeal to this court the order denying his petition for writ was reversed (*Dang Foo v. Weedin,* 8 F. (2d) 221). In that opinion His Honor Judge Rudkin held that there was no evidence tending to contravert the prima facie effect of the traveler's certificate. The court also pointed out that nothing contained in the Immigration Act of 1924 impaired the effect of the certificate.

We turn now to the decision of the Circuit Court of Appeals for the Second Circuit in the equitable action, upon which decision appellant relies.

It will be observed in the first place that in that case "no period of his allowed stay was fixed at the time of his admissions by either court or the immigration officials." Hence it did not appear that at the time he embarked in business as a merchant he was unlawfully here by reason of having remained longer than the time for which admitted. Hence that decision does not reach the particular question involved in the case at bar. In the second place we submit that the majority opinion in the Dang Foo case is in direct conflict with the holdings of this court. The majority opinion seems to hold that a traveler is, because of the Chinese Treaty, entitled to remain indefinitely notwithstanding the restrictions imposed by the Immigration Act of 1924.

In the case of

Wong Gar Wah v. Carr, supra,

this court held that the rights of a Chinese traveler were temporary and that on the expiration of the period for which he was admitted, "he is subject to deportation under the express provisions of Section 14 of the Immigration Act of 1924" notwithstanding the fact he had become a merchant. In that case this court also considered the contention that the treaty rights were controlling, and discarded it on authority of its decision in *Jeu Jo Won v. Nagle,* supra.

The case of *Jeu Jo Won v. Nagle,* as we have pointed out above, directly held that the only treaty rights preserved by the Immigration Act of 1924 are those

relating to aliens entitled to enter solely to carry on trade, and that the rights of the appellant were measured by the Immigration Act of 1924. His Honor Judge Rudkin in that case also pointed out that such a construction was not in conflict with the decision of this court in the case of *Dang Foo v. Weedin,* supra, and other decisions, because in those cases it was merely held that the Immigration Act of 1924 does not exclude merchants or travelers. The Act still permits the entry of those classes, not because the treaty is paramount (an alien although admissible under a treaty shall not be admitted if he is excluded by any provision of the Immigration Act of 1924, see Sections 25 and 28 G (8 U. S. C. A. 223, 224 G)), but because the Immigration Act of 1924 expressly permits the entry of those particular classes under the limitations imposed by Sections 3, 14 and 15.

Hence it is obvious that Dang Foo, although in possession of a traveler's certificate which had not been contraverted, was entitled to enter only by virtue of Section 3 (2) of the Act, and that such entry was for a limited time by reason of Sections 14 and 15 of the Act. That is the view taken by this court in the decisions we have cited above, and is the view which was taken by Circuit Judge Swan in his dissenting opinion in the case of *Dang Foo v. Day,* supra.

We submit therefore that the case of *Dang Foo v. Day,* is not in point because it did not appear in that case that the period of temporary admission had ex-

pired before Dang Foo assumed his mercantile occupation. Furthermore, the decision overlooks the provision in Section 25 of the Immigration Act of 1924 (8 U. S. C. A., Sec. 223) that "an alien, although admissible under the provisions of the immigration laws other than this act, shall not be admitted to the United States if he is excluded by any provision of this act, Sec. 28 G (8 U. S. C. A., Sec. 224 G) defining the term 'immigration laws' as including 'all laws, *conventions, and treaties* of the United States relating to the immigration, exclusion or expulsion of aliens." And finally the decision is in direct conflict with the decisions of this court in the cases of

Wong Gar Wah v. Carr, 18 F. (2d) 250, certiorari denied, 275 U. S. 529;
Jeu Jo Wan v. Nagle, 9 F. (2d) 309.

Appellant seeks to liken his case to that of one who is admitted as a trader and thereafter abandons one line of business endeavor to engage in another. There is, of course, no similarity. A trader would not necessarily cease to be such by making a change in the particular line of business endeavor pursued by him. But appellant had abandoned the status under which he was admitted by remaining beyond the period fixed, without any effort to have that period extended, and at the time he assumed the occupation of Manager of Z. Inouye and Company his continued presence in the United States was without lawful right and had been unlawful for several months prior thereto.

Appellant argues that the time of his change of status is a false quantity. If that were so, an alien visitor might remain here for years in excess of the terms of his admission under the act and could then acquire a right to stay notwithstanding his unlawfully remaining, by engaging in trade. All the authorities are opposed to any such theory.

CONCLUSION.

It is conceded that petitioner was admitted for a temporary fixed period of six months as a visitor and that he took no steps to have that temporary admission extended. It is likewise conceded that neither at the time of his entry nor at the expiration of his temporary admission was he engaged in trade or of a status entitling him to enter or remain as a trader. Under express terms of the act and regulations, his admission was limited to six months and at the expiration of that time he was subject to deportation. His claim is that by virtue of an occupation which he assumed during a period when he was unlawfully remaining in the country, he acquired a right to stay. It is obvious that at that particular time he was unlawfully here and his position was no different from one whose original entry had been unlawful. Hence, under all the authorities, he could gain no right to stay by taking up such an occupation at that time. What his rights would have been had he been

a trader when he entered or had he changed his status while lawfully here as a visitor before his time expired, is not involved.

We submit that the decision of the court below was correct and should be affirmed.

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